United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2001

To be argued by
PAUL VIZCARRONDO, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2001

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES WRIGHT,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James Wright appeals from an order filed October 25, 1974, in the United States District Court for the Southern District of New York by the Honorable Henry F. Werker, United States District Judge, denying without a hearing his petition to vacate his conviction pursuant to Title 28, United States Code, Section 2255.

Indictment 70 Cr. 937, in seven counts, was filed on November 9, 1970. Counts One, Two and Six charged Wright and a co-defendant, Dolores Glover, with receiving, concealing and facilitating the transportation and concealment of cocaine, in violation of Title 21, United States Code, Sections 173 and 174. Counts Three and Five charged both defendants with similar violations of Title 21, United States Code, Sections 173 and 174 involving heroin, while Count Four charged Wright alone with a violation of these statutes involving heroin. Finally, Count Seven charged

Wright and Glover with conspiring to violate Sections 173 and 174 of Title 21, United States Code.

Trial of Wright * commenced on May 10, 1971 before the Honorable Thomas F. Croake, United States District Judge, and a jury. It concluded on May 12, 1971, when the jury returned verdicts of guilty on Counts Three and Four but was unable to agree on Count Five, which was then dismissed with the Government's consent.

On June 16, 1971, Judge Croake sentenced Wright to concurrent terms of imprisonment of ten years and fined him $1,000.

This Court affirmed Wright's conviction, 466 F.2d 1256 (2d Cir. 1972), and the Supreme Court denied his petition for a writ of certiorari. 410 U.S. 916 (1973).

After the United States Supreme Court handed down its decision in *United States* v. *Giordano,* 416 U.S. 505 (1974), Wright filed, in September, 1974, this petition, contending that in light of *Giordano* his conviction should be set aside. In an opinion and order filed October 25, 1974, Judge Werker denied the petition. (A. 3-7).**

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* Prior to the presentation of evidence, the Government moved to sever the trial of Glover, who was, and continues to be, a fugitive. At that time the Government also moved to sever Counts One, Two, Six and Seven, the three cocaine counts and the conspiracy count. Judge Croake granted both motions and the Government proceeded to trial on Counts Three, Four and Five, the heroin counts. Count One, Two and Six were dismissed with the consent of the Government after it had rested. Count Seven remains open.

** Page citations preceded by "A" are to Wright's appendix on appeal.

Statement of Facts

A. The Proof At Trial

In its opinion affirming Wright's conviction, this Court summarized the essential facts of the case as follows:

> "During part of 1969 and most of 1970, federal agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) in Pennsylvania and New Jersey had been surveilling Eugene Lawson, who was believed to be a heavy narcotics trafficker. In the spring of 1970, wiretaps were authorized for telephones located at Lawson's place of business in Philadelphia and at his home in Atco, New Jersey. Those taps, and other information, linked Lawson to several major narcotics violators in the Philadelphia area. The taps also disclosed several conversations from Lawson's phones to various persons (including a 'Jimmy') at a Manhattan telephone number listed to Dolores Glover. On September 21, 1970, another wiretap was authorized for a telephone at Lawson's home, this time on an unlisted private line that had not been previously tapped. As a result of this tap, on October 5, 1970, a conversation was overheard with a 'Mickey' at the Glover telephone number. A female voice, calling that number, stated that 'Gene' Lawson would pick up narcotics in New York 'tonight.' Thereafter, according to the affidavit for a search warrant of the Glover apartment:[*]
>
> > continuous surveillance was maintained on Eugene Lawson. He was followed to New York

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* The affidavit of Special Agent Frank Wickes in support of the application for a search warrant of Glover's apartment was in error in one respect. Continuous surveillance of Lawson began after a telephone conversation between Lawson and Wright intercepted on telephone number (215) WA 3-5579 on October 4, 1970, not after the October 5 telephone conversation referred to in Wickes' affidavit. See affidavit of Special Agent Edward W. Cassidy, dated October 8, 1974 (A. 13).

> today, October 6, 1970, where he proceeded to 146 West 120th Street, and entered Apartment 5 [the Glover apartment]. He was not carrying anything. Lawson later emerged carrying a shopping bag which he placed in the trunk of his car. Lawson was then followed through New York and onto the New Jersey Turnpike where he was arrested. On his person was approximately 33 grams of heroin, approximately 5 grams of what appeared to be cocaine. The shopping bag in the trunk contained mannite and quinine.

Following Lawson's arrest, BNDD agents, relying on the affidavit reciting the above and additional information, obtained a search warrant for the Glover apartment in Manhattan. The agents arrived there the same evening, at about 8:15 P.M., knocked on the door, identified themselves and stated that they had a search warrant. According to the Government's witnesses, whose testimony we must now credit, the agents were not admitted, but they heard shuffling sounds and a flushing toilet. At that point, the agents forced open the apartment door and arrested appellant Wright, who was standing in the bathroom, his hands and arms covered with white powder. Cocaine was found floating in the toilet bowl and mannitol was found sprinkled about the rim. A small tinfoil packet containing .22 grams of heroin (Count 4) was in Wright's pocket, three envelopes containing 42.7 grams of heroin were on the kitchen table (Count 3) and six envelopes containing 21.37 grams of heroin were found in a paper bag pinned inside a jacket in the bedroom (Count 5). Cocaine in a foil wrapper and lying as a 'loose powder' was found on the kitchen table; 70.99 grams of cocaine were also found in a hall closet. Over $8,000 in cash was uncovered, along with two sets of measuring scales, six bottles of quinine, several hundred mannite cubes and 15 boxes, each containing 1,000 glassine envelopes."

466 F.2d at 1257-58. No recorded conversations were introduced at Wright's trial, nor was any reference made at trial to them.

B. The Wiretap Orders

There were three sets of wiretap orders connected to this case. On March 31, 1970, the Honorable John W. Lord, Jr., then Chief Judge of the Eastern District of Pennsylvania, issued an order authorizing a wiretap on Eugene Lawson's business telephone in Philadelphia, (215) 747-8140. That same day, the Honorable Mitchell H. Cohen, then Chief Judge of the District of New Jersey, issued an order authorizing a wiretap on Lawson's home telephone in Atco, New Jersey (609) 767-8521.*

Both orders authorized the wiretaps for a period of twenty days, and the applications for the orders for both taps had been approved in advance by then Attorney General John N. Mitchell, although the applications incorrectly indicated that they had been approved by As-

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* All of the wiretap orders in this case were accompanied by an order authorizing the Government to use a pen register on the telephones that were being wiretapped. "A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations." *United States* v. *Giordano, supra,* 416 U.S. at 549 n.1 (Powell, *J.*, dissenting in part). The use of pen registers is not governed by Title III of the Omnibus Crime Control and Safe Street Acts of 1968. *United States* v. *King,* 335 F. Supp. 523, 548-49 (S.D. Cal. 1971), *aff'd in part and rev'd in part on other grounds,* 478 F.2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 950 (1974); *United States* v. *Vega,* 52 F.R.D. 503, 507 (E.D.N.Y. 1971).

sistant Attorney General Will Wilson. See *United States* v. *Chavez*, 416 U.S. 562 (1974).

On April 20, 1970, Chief Judge Lord signed an order extending his March 31 wiretap authorization for a period of fifteen days.* On April 21, 1970, Chief Judge Cohen signed an order extending his March 31 wiretap order for a period of fifteen days. In addition to the telephone number specified in the earlier order, this order covered another telephone number at Lawson's home in Atco, New Jersey, (215) 925-4752. Interceptions of wire communications pursuant to both April extension orders were unlawful under *United States* v. *Giordano, supra*, in that the applications for the orders were not approved in advance by the Attorney General or an Assistant Attorney General specifically designated by him.

The third set of orders was issued on September 21, 1970. Chief Judge Lord authorized a wiretap for a period of fifteen days on a telephone number at Lawson's business address in Philadelphia, (215) GR 6-0520; Chief Judge Cohen authorized a wiretap on a telephone number at Lawson's home in Atco, New Jersey, (215) WA 3-5579. The applications for both September wiretap orders were approved in advance by Attorney General Mitchell.

Part of the information contained in the affidavits in support of the applications for the September orders was obtained as a result of the defective April wiretap orders. However, the (215) WA 3-5579 telephone number at Lawson's home was not discovered as a result of the defective April wiretaps. Rather, the request for authorization to intercept conversations over that telephone number origi-

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* In addition to the telephone number specified in the first order, the April 20 order authorized the interception of wire communications on another telephone number at Lawson's business address, (215) 747-8141.

nated as the result of a change in the unpublished number assigned to a telephone located at Lawson's residence in New Jersey. *See* p. 10 of the Affidavit of Special Agent Edward W. Cassidy, dated September 21, 1970, in support of the Government's application for a wiretap order for (215) WA 3-5579 (A. 39). As previously stated, on April 21, 1970, application was made and an order granted to intercept conversations to and from a telephone bearing the unpublished number (215) 925-4752. However, in checking with the telephone company on April 21 and 22, 1970, Special Agent Edward W. Cassidy discovered that number (215) 925-4752 had been changed on April 20, 1970 to (215) 923-5579 (or (215) WA 3-5579). As a result of this number change, no attempt was made to intercept conversations over (215) 925-4752 pursuant to the April authorization order. The (215) 923-5579 number was therefore discovered prior to and independent of the defective interceptions that commenced on April 21, 1972.

ARGUMENT

POINT I

The relief Wright seeks is not available under Title 28, United States Code, Section 2255.

Wright has appealed from the denial of a petition brought under Title 28, United States Code, Section 2255. The argument that he advances—that his conviction should be vacated because it is based on evidence obtained as a result of the April wiretaps, which were not authorized by one of the officers of the Justice Department specified in Title 18, United States Code, Section 2516(1)—is not cognizable under Section 2255 because Wright failed to make this claim at trial or on direct appeal from his judgment of conviction and, in any event, because his claim is not of the dimensions necessary to come within Section 2255.

On Wright's direct appeal, this Court set forth his claims of illegal wiretapping as follows:

> "B. The Wiretap Issues
>
> Appellant raises a number of issues concerning the September 21, 1970, wiretap order, authorizing a tap on a private phone in the New Jersey home of Eugene Lawson. In particular, appellant claims that the wiretap statute is unconstitutional on its face, that the authorization for the particular tap failed to conform with the requirements of 18 U.S.C. § 2516(1), and that there was insufficient probable cause to support the order since all of the information in the supporting affidavit was 'stale'. Appellant asserts standing to raise these issues by claiming that the evidence seized through the wiretap formed the basis for the probable cause supporting the search warrant for the Glover apartment.
>
> Not one of these issues was raised before, during, or after the trial, although various motions directed at suppressing evidence were made on a variety of grounds. The failure to press these claims is all the more striking since Wright did not overlook the possibility that the search warrant might be subject to attack on the basis of a wiretap. Wright specifically reserved his right to raise that basic issue pending discovery of information concerning wiretaps, but after receiving it failed to move to suppress." 466 F.2d at 1259.

Title 18, United States Code, Section 2518(10)(a) sets forth the statutory requirement of a pretrial motion to suppress wiretap evidence, and provides in pertinent part:

> "Such motion [to suppress the contents of any intercepted wire . . . communication, or evidence derived therefrom] shall be made before the trial . . .

> unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion."

Here, Wright had every opportunity to make a pretrial motion at the appropriate time and does not claim that he did not have whatever information he needed to make a motion on the ground now raised, or that, if so, he could not have obtained it. His oversight is all the more significant because at the time of his trial in 1971, this Court had not yet handed down the decisions that were adverse to him on this issue and that were later overruled by *Giordano*. See *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972), *vacated*, 417 U.S. 903 (1974); *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972), *vacated*, 417 U.S. 903 (1974). By his failure to make a timely pretrial motion in the district court, Wright waived whatever claim he had as to the improper authorization for the April wiretap applications. *United States* v. *Sisca*, 503 F.2d 1337, 1346-49 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *see United States* v. *Ellis*, 461 F.2d 962, 969 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Blackwood*, 456 F.2d 526, 529 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States* v. *Bennett*, 409 F.2d 888, 901 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1970); *United States* v. *Weldon*, 384 F.2d 772, 775 (2d Cir. 1967). Indeed, despite his claim of improper authorization of the September order, made for the first time in this Court on direct appeal, Wright made no attack on the authorization of the April order.

Furthermore, this Court declined to consider such wiretap claims as Wright made on direct appeal—including an attack on the September order as improperly authorized—because of his failure to properly raise them in the court below. 466 F.2d at 1259-60. Wright cannot avoid this holding by raising on a Section 2255 petition an interrelated issue that he did not raise either at trial or on direct appeal. As the Supreme Court has stated:

> "[T]he § 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal—*e.g., motion to suppress* under Fed. Rule Crim. Proc. 41(e) or appeal under Fed. Rule App. Proc. 4(b)." *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1969) (emphasis added).

See United States v. *West*, 494 F.2d 1314 (2d Cir. 1974); *cf. United States* v. *Romano*, Dkt. No. 74-2145 (2d Cir., May 13, 1975), slip op. at 3503-3505. This principle takes on even greater force where, as here, the claim raised is not a constitutional one.

Finally, even assuming that Wright had properly raised this issue at the trial level and had carried it through the appellate process without prevailing on it, it is not an issue that is cognizable under Section 2255. In *Davis* v. *United States*, 417 U.S. 333 (1974), the Supreme Court stated that Section 2255 relief "'. . . is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error . . . [T]he appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Id. at 346. Wright's claim does not approach that standard. *Compare United States* v. *Travers*, Dkt. No. 74-1737 (2d Cir., December 16, 1974). "Here . . . we deal not with fundamental constitutional rights, but with a technical procedural error in the Department of Justice which was readily correctible had its presence been recognized." *United States* v. *Gibson*, 500 F.2d 854, 855 (4th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975).

POINT II

Wright has no standing to challenge wiretaps authorized by the April 20 and 21, 1970 orders.

The only wiretaps that were illegal were those based on the April 20 and 21, 1970 orders and only because the applications for the orders authorizing them were not approved by the Attorney General or an Assistant Attorney General specifically designated by him. Assuming arguendo that those wiretaps are relevant to Wright's prosecution—a proposition that the Government disputes—Wright has no standing to move for the suppression of any evidence obtained pursuant to them.

In order to have any evidence obtained as a result of the April 20 and 21, 1970 wiretap orders suppressed, Wright must be an "aggrieved person" within the meaning of Title 18, United States Code, Section 2518(10)(a). An "aggrieved person" is defined in Title 18, United States Code, Section 2510(11) as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." *See also* Fed. R. Crim. P. 41(e). This definition is co-extensive with, and was not intended to expand, traditional concepts of standing to object to a search and seizure in violation of the Fourth Amendment. *See Alderman* v. *United States*, 394 U.S. 165, 175-76 n. 9 (1969); *United States* v. *Bellosi*, 501 F.2d 833, 842 n. 22 (D.C. Cir. 1974); *In re Womack*, 466 F.2d 555, 558 (7th Cir. 1972); *United States* v. *Doe*, 451 F.2d 466, 468-69 (1st Cir. 1971); *cf. United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972). Thus, an illegal wiretap cannot be complained of unless a right of the complaining party has been invaded. Specifically, Wright has no standing to object to an illegal wiretap unless it was his telephone that was wiretapped or he was a party to a telephone conversation that was intercepted.

Wright's telephone was not wiretapped as a result of the April 20 and 21 orders—or any other orders, for that matter. Further, Wright has never contended that he was a party to any conversation intercepted pursuant to the April 20 and 21 orders. Indeed, at his trial Wright took the stand and testified he did not know Gene Lawson, the person whose telephones were wiretapped under the April 20 and 21 orders. *See* trial transcript at p. 277. Wright was not in fact a party to any telephone call intercepted pursuant to the April wiretap orders. *See* the affidavit of Special Agent Edward W. Cassidy, dated October 9, 1974.

As the Supreme Court has stated, "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." *Jones* v. *United States*, 362 U.S. 257, 261 (1960). Wright, having neither alleged nor established that he was such a victim, has no standing to challenge electronic surveillance conducted pursuant to the April 20 and 21 orders.

Wright, in his brief on appeal, contends that he has the requisite standing to attack the April orders because a conversation of his was intercepted pursuant to the September 1970 wiretap orders. That argument misses the mark. The Government does not dispute that Wright has standing to challenge the September wiretap orders. Those orders, however, were not defective except to the extent that they were based on information obtained as a result of the illegal April wiretap orders, and it is the latter that Wright has no standing to challenge. The April orders did not infringe upon any right of Wright's under the statute or the United States Constitution, and he cannot complain that information obtained as a result of those orders supplied in part the probable cause for

the September wiretap orders. Indeed, it would be anomalous if Wright had standing to suppress evidence offered to establish probable cause for the issuance of a wiretap order when he clearly would have no standing to contest the admission of that evidence against him at trial. *See Brown* v. *United States,* 411 U.S. 223 (1973); *Alderman* v. *United States,* 394 U.S. 165 (1969).*

A recent case directly on point is *United States* v. *Gibson,* 500 F.2d 854 (4th Cir. 1974), *cert. denied,* 419 U.S. 1106 (1975). *Accord, United States* v. *Scasino,* 513 F.2d 47 (5th Cir. 1975). In *Gibson* the defendant moved to suppress evidence obtained from a wiretap on the telephone of one Commings, which he had standing to do. The only claim of illegality in the Commings wiretap was that the probable cause for it was obtained in part from earlier wiretaps on the telephone of one Mantello. The Mantello wiretaps were illegal under the holding of *Giordano.* Gibson, however, was not an "aggrieved person," within the meaning of Section 2518(10)(a), with regards to the Mantello wiretaps. Thus, the Court held, Gibson had no standing to challenge the Mantello wiretaps, or the Commings wiretaps on the basis that information that in substantial part supplied probable cause for their procurement was obtained from the Mantello wiretaps.

The holding in *Gibson* is merely an application of the principle that a defendant must have the requisite standing to move to suppress evidence that was allegedly obtained in an illegal manner not only when such evidence is offered against him at trial, but also when it is used to establish probable cause. *See United States* v. *McConnell,* 500 F.2d

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* The Court below explicitly held that Wright has no standing to challenge evidence obtained as a result of the April wiretap orders. To the extent that it suggested that Wright can move to suppress such evidence in challenging the legality of the fruits of the September wiretap orders, the Government respectfully submits that the District Court was in error.

347, 348 (5th Cir. 1974); *United States* v. *Garcilaso de la Vega*, 489 F.2d 761, 763 (2d Cir. 1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205-07 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Altizer*, 477 F.2d 846 (5th Cir. 1973); *Bryson* v. *United States*, 419 F.2d 695, 700 n.24 (D.C. Cir. 1969); *United States* v. *Ceraso*, 355 F. Supp. 126, 127 (M.D. Pa. 1973). Indeed, this court applied this principle in its opinion denying Wright's appeal from his judgment of conviction.

> "The search was of Glover's apartment in New York City. Since appellant was lawfully there at the time and evidence uncovered by the search was used against him, he does have standing to challenge the search warrant itself as based upon insufficient probable cause .... But it does not follow that appellant may go one step further back and assert Lawson's fourth amendment rights simply because information from a tap on Lawson's phone in New Jersey, obtained as part of an investigation not aimed at appellant, was used to justify the warrant to search Glover's apartment."

466 F.2d at 1259. Similarly, Wright cannot assert Lawson's rights under the statute simply because information from an illegal tap on Lawson's phone, obtained as part of an investigation not aimed at Wright, was used to secure an order for a wiretap against Lawson on which a conversation of Wright's was intercepted and which resulted in information that led to his arrest.*

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* It is his misapprehension of the significance of standing here which causes Wright to place such emphasis on the post-*Giordano* adjudication of Lawson's rights on remand in the Eastern District of Pennsylvania, which is for the most part irrelevant here.

POINT III

Wiretaps conducted pursuant to the September 21, 1970 order for telephone number (215) 923-5579 were legal, as was the October 6, 1970 search and arrest of Wright.

Assuming arguendo that Wright does have standing to challenge the April 20 and 21, 1970 wiretap orders, their illegality does not affect the legality of his arrest and the search of the apartment in which he was arrested.

The application for the search warrant pursuant to which the apartment of Dolores Glover, apartment 5 at 146 West 120th Street, was searched, and which led to Wright's arrest, was supported by the affidavit of Special Agent Frank Wickes.* The legality of that search war-

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* The Wickes affidavit in support of the search warrant is set forth below in its entirety:

"I am Frank Wickes, Special Agent, Bureau of Narcotics and Dangerous Drugs, U.S. Department of Justice, assigned to the New York Office. The following information has been furnished to me by agents of my office and of the Philadelphia, Pennsylvania office of the BNDD:

On September 21, 1970, authorization was received in the Eastern District of Pennsylvania from a United States District Judge to intercept telephone communications to and from a telephone in Philadelphia, Pennsylvania. Eugene Lawson had been under investigation by the Philadelphia office of the BNDD for approximately one year when the intercept was authorized. On several occasions Lawson was overheard in conversation with a female in New York named 'Mickey' and a male named 'Jimmy.' These conversations concerned narcotics and Lawson's purchase of them. They were conducted with persons using New York telephone No. 212-666-5855. This number is registered to Dolores Glover, Apartment 5, 146 West 120th Street, New York, New York.

On October 5, 1970, a female was overheard talking to 'Mickey' on the 666-5855 number. She was heard to tell 'Mickey' that 'Gene' would be up to pick up narcotics in New York 'tonight.'

[Footnote continued on following page]

rant is dependent on whether the Wickes affidavit, minus whatever information it contains that is "tainted" by an illegal source, established sufficient probable cause for the issuance of the warrant. *See United States* v. *Koonce*, 485 F.2d 374, 379 (8th Cir. 1973); *United States* v. *Tarrant*, 460 F.2d 701, 703-04 (5th Cir. 1972); *Howell* v. *Cupp*, 427 F.2d 36, 38 (9th Cir. 1970); *James* v. *United States*, 418 F.2d 1150, 1151 (D.C. Cir. 1969); *United States* v. *Sterling*, 369 F.2d 799, 802 (3d Cir. 1966); *Chin Kay* v. *United States*, 311 F.2d 317, 321 (9th Cir. 1962). Judge Weinfeld enunciated the proper standard to be followed in a situation such as this in *United States* v. *Epstein*, 240 F. Supp. 80, 82 (S.D.N.Y. 1965):

> "There is authority, and none to the contrary, that when a warrant issues upon an affidavit containing both proper and improper grounds, and the proper grounds—considered alone—are more than sufficient to support a finding of probable cause, inclusion of the improper grounds does not vitiate the entire affidavit and invalidate the warrant."

In our view, any evidence supporting the issuance of the warrant to search the Glover apartment is tainted only if it was a "fruit" of the illegal April wiretaps. Under this analysis, the third paragraph of the Wickes affidavit, concerning a telephone conversation between "Mickey" and "Gene", contains information derived from a wiretap on a

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Thereafter, continuous surveillance was maintained on Eugene Lawson. He was followed to New York today, October 6, 1970, where he proceeded to 146 West 120th Street, and entered Apartment 5. He was not carrying anything. Lawson later emerged carrying a shopping bag which he placed in the trunk of his car. Lawson was then followed through New York and onto the New Jersey Turnpike where he was arrested. On his person was approximately 33 grams of heroin, approximately 5 grams of what appeared to be cocaine. The shopping bag in the trunk contained mannite and quinine."

telephone number discovered from a conversation of Lawson intercepted on one of the April taps.* That paragraph may thus be said to be tainted by an illegal source, leaving the second and fourth paragraphs of the affidavit to establish the requisite probable cause.

The first two sentences of the second paragraph deal with the general background of the Lawson investigation. The remainder of the paragraph discusses, in general terms, Lawson's conversations with "Mickey" and "Jimmy" concerning narcotics, and states that the conversations were with persons using the telephone number at 146 West 120th Street, apartment 5. While the affidavits in the record indicate that part of the source for this information was the illegal April wiretaps,** they establish that the information was largely obtained independently of those wiretaps. For example, the (212) 666-5855 telephone number, and the fact that it was listed to Dolores Glover, 146 West 120th Street, apartment 5, in New York City, were discovered in March, 1970 (A. 38). Telephone toll records showed that Lawson, a known dealer in narcotics, made numerous calls to the Glover number (A. 36-38). Furthermore, that number was frequently answered by "Mickey" and "Jimmy" (A. 36) in New York City, and a reliable informant provided information that "Big Jimmy", who was a supplier of narcotics, could be reached at (212) 666-5855 (A. 33). On April 14 and 15, 1970, calls were intercepted, pursuant to the March orders, between Wilberta Lawson in New York and Eugene Lawson, during which Eugene stated that he was waiting to hear from "Mickey" and "Jimmy" and that he had not gotten the "thing from Jimmy" (A. 32).

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* The second paragraph of the search warrant states that the wiretap referred to in the third paragraph was authorized on September 21, 1970, by a United States District Judge for the Eastern District of Pennsylvania. That wiretap order was for telephone number (215) GR 6-0520, and that number was discovered during the April wiretaps (A. 37-38).

** See the April 30 telephone call to "Mickey" at number (212) 666-5855 (A. 31, 38).

The fourth paragraph of the Wickes affidavit describes the surveillance of Lawson, his entrance to and exit from 146 West 120th Street on October 6, 1970, and his arrest shortly thereafter with narcotics and cutting agents in his possession. That paragraph, describing events that occurred on the day the affidavit was sworn to and the application made, was the primary probable cause for the issuance of the search warrant. The information contained in the fourth paragraph was obtained from surveillance initiated due to a telephone call intercepted on (215) 923-5579, as authorized by Judge Cohen on September 21, 1970 (A. 13).* As previously pointed out, this telephone number was not discovered as a result of the defective April wiretaps.

Thus, as Judge Werker held below (A. 7), there was sufficient probable cause, in the second and fourth paragraphs of the Wickes affidavit to support the issuance of the search warrant. Indeed, there was sufficient probable cause in the fourth paragraph alone to uphold the warrant. Wright, however, contends that the search warrant is tainted not merely from evidence derived from the April orders but also from any evidence obtained from any September wiretap order, because, he claims, the September wiretap orders were obtained only as a result of the illegal April wiretap orders. Even if the April wiretap orders did lead to the September wiretap order for (215) 923-5579,** it is doubtful that there is a sufficient causal

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* As has been already pointed out, the October 8, 1974 affidavit of Special Agent Cassidy (A. 13) indicates that the supporting affidavit of Special Agent Wickes was in error in one respect. Continuous surveillance of Lawson began after a telephone conversation intercepted on number (215) 923-5579 on October 4, 1970, not as a result of the October 5 telephone conversation referred to in the tainted third paragraph of the Wickes affidavit.

** This number is the one which the agents intercepted the conversation on October 4 between Lawson and Wright which led to the surveillance resulting in Lawson's arrest and the search of the Glover apartment.

connection between the April orders and the search to invalidate the search because of the illegality of the April orders. *See United States* v. *Friedland*, 441 F.2d 855, 856-61 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971). However, the important point is that the illegality of the April wiretap orders does not invalidate the September order for (215) 923-5579 because that telephone number was not discovered as a result of the April wiretap orders and because there was sufficient probable cause, independent of information obtained from the April wiretaps, in the affidavit to support the issuance of the wiretap order for (215) 923-5579.

The analysis for determining taint in the September wiretaps arising from the illegal April wiretaps is similar to that already employed in assessing the legality of the search warrant for the Glover apartment. In *United States* v. *Giordano, supra*, a wiretap was authorized on an application which had not been approved by the Attorney General or a subordinate authorized by the statute to approve such applications. Thereafter, an extension of this order was granted based on an application approved by the Attorney General. Nevertheless, the Supreme Court held communications intercepted under the extension inadmissible. The Court noted that Title 18, United States Code, Section 2518(1)(e) requires that the fact of prior applications and orders be revealed to the judge from whom an extension order is sought, and that subsection (1)(f) directs the application set out either the results obtained under the prior order or an explanation for the absence of such results. Thus, the Court concluded,

> ". . . whether or not the application, without the facts obtained from monitoring Giordano's telephone, would independently support original wiretap authority, the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained. Obviously, those results were

> presented, considered and relied on in this case. Moreover, as previously noted, the Government itself had stated that the wire interception was an indispensable factor in its investigation and that ordinary surveillance alone would have been insufficient. In our view, the results of the conversations overheard under the initial order were essential, *both in fact and in law*, to any extension of the intercept authority. Accordingly, communications intercepted under the extension order are derivative evidence and must be suppressed." 416 U.S. at 505, 533 (emphasis added).

The September wiretap orders in this case cannot be considered an extension of the illegal April wiretap orders, as they were granted more than four months after the April orders terminated.* As such, the information obtained from the April wiretaps was not "essential in law" to the issuance of the September orders. *See United States* v. *Wac*, 498 F.2d 1227, 1231 (6th Cir. 1974);** *United States* v. *Jorge*, Dkt. Nos. 71-135 et al. (M.D. Fla., May 10, 1975), slip op. at 13-15. The inquiry must

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* Wright, in his brief on appeal, states that the April orders terminated on August 3, 1970. That statement is incorrect. The April orders by their terms authorized wiretaps for a maximum of fifteen days, or until May 6, 1970.

** The Court in *Wac* went on to hold that the second wiretap order was illegal in that, although it was not an extension of the first order and therefore the information obtained from the first order was not "essential in law" to the issuance of the second order, the information was "essential in fact" to the issuance of the second order. By this the court apparently meant that information obtained from the first wiretaps was in fact necessary for establishing the probable cause required for the issuance of the second order. That was not so in the instant case. *See United States* v. *Jorge*, Dkt. Nos. 71-135 et al. (M.D. Fla., May 10, 1975), slip. op. at 13-15; *United States* v. *Lanese*, 385 F. Supp. 525, 528 (N.D. Ohio 1974).

therefore focus on whether "tainted" information obtained from the April wiretaps was "essential in fact" to the issuance of the September order for (215) 923-5579. The affidavit in support of the application for the September order for that phone must be examined, therefore, minus the tainted information obtained from the April wiretaps, to determine if probable cause existed for the issuance of that September order.

The September 21, 1970 application and affidavit for telephone number (215) 923-5579 incorporates by reference the affidavits for the interceptions authorized in March and April (A. 28-29, 44-65). There can be no suggestion of taint with respect to those affidavits, since the information contained therein was necessarily collected prior to interception under the April orders. The March affidavits contain information derived from corroborated confidential sources, surveillances, and telephone toll records indicating probable cause to believe that Eugene Lawson and others were engaged in the sale of heroin and various other narcotics and dangerous drugs. The April affidavits contain summaries of conversations (intercepted pursuant to the March orders) in which Eugene Lawson and others discussed sales of heroin.

In addition to the information from the March and April affidavits which is incorporated by reference, the September 21, 1970 affidavit for number (215) 923-5579 contains information received from a reliable informant that he had been told on August 27, 1970, in a meeting with five heroin street dealers, that "Gene Lawson was handling brown heroin at this time." (A. 34-35). The informant's reliability was established by the fact that within the prior two months he had provided reliable information that resulted in two seizures of heroin. *See United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972); *United States* v. *Dunnings*, 425 F.2d 836, 839 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); *United States* v. *Perry*, 380 F.2d 356, 358 (2d

Cir.), *cert. denied,* 389 U.S. 943 (1967). The reliability of this information is further established by the fact that the heroin dealers providing the information were named in the affidavit, *see United States* v. *Vigo,* 413 F.2d 691, 692 (5th Cir. 1969), and that the named individuals were then corroborated as being narcotics dealers by information from Bureau of Narcotics and Dangerous Drugs records. *See Jones* v. *United States,* 362 U.S. 257, 267-72 (1960); *United States* v. *Sultan, supra,* 463 F.2d at 1069; *United States* v. *Dzialak,* 441 F.2d 212, 216 (2d Cir.), *cert. denied,* 404 U.S. 883 (1971); *United States* v. *Viggiano,* 433 F.2d 716, 718-19 (2d Cir. 1970), *cert. denied,* 401 U.S. 938 (1971); *cf. United States* v. *Harris,* 403 U.S. 573, 580-83 (1971). The circumstances underlying the dissemination of this information further establishes reliability, since the statement arose during a meeting of individuals involved in the same type of illicit activity as the subject Eugene Lawson at a time when there was no apparent motive to be untruthful.

In addition, the affidavit contains the statement of another reliable informant that he saw Lawson on August 30, 1970 with an attache case filled with brown heroin at a meeting where money was exchanged (A. 35).

Further probable cause is supplied by reliable informant information indicating that "Big Jimmy" is a source of narcotics in New York City and could be reached at telephone number (212) 666-5855 (A. 33), which corroborates and explains the New York calls between Eugene and Wilberta Lawson, intercepted on April 14 and 15, 1970, during which Eugene stated that he is waiting to hear from "Mickey" and "Jimmy" and that he did not get the "thing from Jimmy" (A. 32). This information is further corroborated by toll information disclosing calls to New York Number (212) 666-5855, the number answered by "Mickey" and "Jimmy" (A. 36-39).

The affidavit also contains information received on August 19, 1970, from an arrested heroin dealer who stated that "Charles Matthews" or "Heads" was supplying him (A. 35). Since this was information against the declarant's penal interest, a disinterested and prudent person would credit it as reliable. *United States* v. *Harris, supra,* 403 U.S. at 583; *United States* v. *Miley,* Dkt. No. 74-2207 (2d Cir., March 19, 1975), slip op. at 2383-2384; *Agnellino* v. *New Jersey,* 493 F.2d 714, 726 (3rd Cir. 1974). When this information is taken in conjunction with Eugene Lawson's reference to "Heads" in a call intercepted on April 9, 1970 (A. 45), and with the informant and toll information in the March affidavit (A. 56-58) that connects Lawson and Matthews (or Mathis), there is yet additional probable cause to believe Eugene Lawson was engaged in the purchase, sale, and distribution of narcotics drugs.*

In sum, when the tainted information obtained from the April wiretaps is excised, the remaining material is sufficient to establish probable cause for the issuance of the September wiretap orders.

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* Lawson was indicted with five other defendants in the United States District Court for the Eastern District of Pennsylvania for violations of the Federal Narcotics laws. On December 2, 1971, a jury returned a verdict of guilty against each defendant on all counts. The judgments of conviction were vacated by the Third Circuit on June 10, 1974, and the case was remanded to the district court for reconsideration in light of *Giordano.* Upon the remand, the defendants moved to suppress evidence obtained as a result of the September wiretaps. The district court granted the motion on August 23, 1974, holding that the September wiretap orders were obtained as a result of evidence derived from the wiretaps under the illegal April orders. The Government submits that the court below, in its decision directly contrary to the opinion of the court in the Eastern District of Pennsylvania, correctly analyzed and decided this issue.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Paul Vizzarondo, Jr., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of June, 1975, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Fisher, Rosner & Scribner
401 Broadway
New York, New York
10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Paul Vizzarondo, Jr.

Sworn to before me this
12th day of June, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977